

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 16 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Reexamination of the Comparative Standards) MM Docket No. 95-31
for Noncommercial Educational Applicants)

TO THE COMMISSION

MOTION FOR STAY

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 C.F.R. §1.429(k), respectfully moves for a stay of the application of the auction rules described in the Second Report and Order, 68 Fed. Reg. 26220 (May 15, 2003), FCC 03-44 (released April 10, 2003) ("Second R&O").^{1/}

A petition for reconsideration of the Second R&O is being filed this date. Therein, MMTC demonstrates that the auction rules, as finalized by the Second R&O, will lead to substantial gamesmanship and fraud, imperiling fatally the Commission's only significant policy aimed at fostering minority broadcast ownership -- auction bidding credits.

In determining whether there is good cause to stay the effective date of the Second R&O until the Commission revises its auction procedures as proposed in the Petition for Reconsideration, the Commission should apply the criteria set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) as explained in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) ("Holiday Tours"). Under the Holiday Tours test, MMTC must

^{1/} This Petition reflects the institutional views of MMTC and is not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if a stay is granted; and (4) that the public interest favors a stay. Holiday Tours at 842. That showing is provided below.

(1) MMTC will prevail on the merits. In the two years in which MMTC has sought the relief advocated in the Petition for Reconsideration, no party has lodged an objection. The rules plainly contain a major flaw: they allow an auction bidder to conceal from its opponents that it is actually not entitled to bidding credits it has claimed and has notified the public that it intends to deploy. This flaw is very easy to cure. As noted in the Petition for Reconsideration, p. 4, the Commission can simply require

immediate posting on the auction website of the loss of any attributes that entitled an applicants to bidding credits, and disgorgement of the value of any improvidently deployed bidding credits[.] Auctions will feature next-day status reports on bidding, and the bidding credits system already contemplates post-auction payment adjustments. Thus, the burden on the Commission and on bidders of preventing auction gamesmanship is virtually zero.

(2) MMTC (more specifically, its members and constituents who are minority broadcasters, new entrants, and broadcast consumers desirous of receiving diverse program service) will suffer irreparable harm absent a stay. It is a national scandal that only 1.3% of the asset value of the radio industry is in the hands of minorities. To correct this, new entrants must have every opportunity to participate meaningfully in the last opportunities to secure access to the FM spectrum. Genuine new entrants, including many minorities, will be unable to raise financing to participate in an easily corruptible auction system; or if they do participate, their chances of prevailing against well-financed fraud artists will be minimal. The harm if the

Commission conducts a flawed FM auction will be irreparable. In Auction #37, the Commission contemplates offering probably the last new FM facilities in medium sized and small communities throughout the nation. Once these approximately 350 construction permits are issued, they cannot realistically be recalled. Only a stay can prevent this disaster.

(3) No party would be harmed by a stay. The auction is for new facilities only; it does not affect incumbent facilities. No party in this docket has claimed that absent an immediate opportunity to bid on new facilities it will experience irreparable injury.

(4) A stay would serve the public interest. Auction bidding credits are the only significant means remaining to promote minority broadcast ownership. The Commission has repeatedly emphasized the importance of providing opportunities for minorities in broadcast station ownership. See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978). Congress expects the Commission to use bidding credits or similar methods to promote competition and diversity. 47 U.S.C. §309(j)(4); see FCC Report to Congress on Spectrum Auctions, 13 FCC Rcd 9601, 9629 (1997). A stay would enable the Commission to correct its demonstrably flawed auction rules and thereby adhere to Congress' intention that it promote competition and diversity.

Rulemaking decisions, once rendered, are often irreversible. Consequently, the Commission in recent years has frequently

exercised caution by granting stays of the effective dates of controversial and contested rulemaking orders.^{2/} Such caution is also appropriate here.

WHEREFORE, MMTC respectfully requests that the effective date of the Second R&O be stayed until the Commission corrects its auction rules as described in MMTC's Petition for Reconsideration of this date.

Respectfully submitted,



David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@mmtconline.org

June 16, 2003

^{2/} See, e.g., Numbering Resource Optimization (Order), 15 FCC Rcd 17128, 17128-29 ¶2 (2000) (in which, much like the situation presented here, the Commission stayed the effective date of certain rules until it could have an opportunity to rule ab initio on petitions for waiver). See also Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services (Fourth MO&O), 15 FCC Rcd 7051, 7056 ¶14 (1999); Telecommunications Carriers' Use of Customer Proprietary Network Information (Order), 13 FCC Rcd 19390, 19392 ¶4 (1998); Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (Order), 10 FCC Rcd 4146, 4149 ¶8 (1994).